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September 12, 2013

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

2012AP657-CRNM State of Wisconsin v. Joseph M. Kazel (L.C. #2010CF4374)

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

Joseph Kazel appeals a judgment convicting him of second-degree sexual assault with use of force. Attorney Jeremy Perri has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744

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

(1967); and ***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 whether Perri has grounds to withdraw his plea or seek resentencing. Kazel 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 guilty plea, and we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must at a minimum 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. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The circuit court conducted a plea colloquy exploring the defendant'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; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure the defendant understood that it would not be bound by any sentencing recommendations. The court also inquired into the defendant'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 addendum and jury instruction. Kazel indicated to the court that he had gone over the form with counsel, and is not now claiming to have misunderstood anything on it. *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 and acknowledged by Kazel to be substantially true provided a sufficient factual basis for the plea. Kazel indicated satisfaction with his attorney, and there is nothing in the record to suggest that trial counsel's performance was in any way deficient. Kazel has not alleged any other facts that would give rise to a manifest injustice. Therefore, Kazel's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to the defendant'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 the defendant was afforded an opportunity to comment on the PSI, present a character witness, and address the court both personally and by counsel. 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 deemed it aggravated both due to the victim's extreme vulnerability, having no limbs, and due to the premeditation demonstrated by the items Kazel brought with him. With respect to the defendant's character, the court rejected Kazel's attempts to attribute his behavior to intoxication and/or mental health issues. The court also noted that Kazel committed this offense on the same day that he was sentenced on another case. The court concluded that a prison term was necessary both for punishment and to protect the community.

The court then sentenced Kazel to twenty-two years of initial confinement and ten years of extended supervision. It also awarded 315 days of sentence credit; imposed standard costs

and conditions of supervision; directed the defendant to provide a DNA sample and pay the fee; and determined that the defendant was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The sentence imposed was within the applicable penalty range and constituted about 80% of the maximum exposure Kazel faced. *See* WIS. STAT. §§ 940.225(2)(a) (classifying second-degree sexual assault with use of force as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). 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 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.

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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals