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October 24, 2013

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

2012AP1389-CRNM State of Wisconsin v. Timothy R. Kind (L.C. # 2011CF216)

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

Timothy Kind appeals a judgment convicting him, after a plea of no contest, of two counts of third degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2011-12).[1] Attorney Suzanne Hagopian has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***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.

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

429 (1988). The no-merit report addresses the validity of the plea and sentence. Kind 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, 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 in a manner that resulted in the defendant entering an unknowing plea, 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.

Kind entered a no contest plea pursuant to a negotiated plea agreement, the terms of which were presented in open court. In exchange for Kind's plea, the State agreed to amend the charges against Kind from sexual assault of a child under sixteen years of age to third degree sexual assault, which the State did. The circuit court conducted a standard plea colloquy, inquiring into Kind's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Kind's understanding of the nature of the charges, the penalty ranges 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 Kind understood that it would not be bound by any sentencing recommendations. In addition, Kind provided the court with a signed plea questionnaire. Kind 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 court obtained defense counsel's statement on

the record that the criminal complaint established a factual basis for the plea. *See* WIS. STAT. § 971.08(1)(b). We have found nothing in the record to suggest that counsel's performance was in any way deficient, nor have we identified any other facts that would give rise to a manifest injustice. Therefore, Kind's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Kind's sentence would also lack arguable merit. Our review of a sentencing 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). The record shows that Kind was afforded an opportunity to address the court prior to sentencing and that he did so. The court considered 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. In addition to the severity of the offense, the court noted the approximately eight-year age difference between Kind and each of the two victims. With respect to Kind's character, the court stated that Kind probably was "really not a bad person," but that he had not changed his behavior even after he previously had been convicted of sexual assault. The court concluded that a prison term was necessary to protect the public and to serve Kind's rehabilitation needs.

The court then sentenced Kind to the maximum term of five years of initial confinement and five years of extended supervision on each count, to be served consecutively. *See* WIS. STAT. §§ 940.225(3) (classifying third degree sexual assault as a Class G felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of

extended supervision for a Class G felony). On the original charges, which were amended as a result of the plea agreement, Kind faced a maximum of eighty years of imprisonment. *See* WIS. STAT. §§ 948.02(2), 973.01(2)(b)3. and (d)2. The court stated that there was a "very high" need to protect the public in this case and that it had considered probation, but that confinement was necessary, especially given Kind's failure in the past to change his behavior. An appellate court has a duty to affirm a sentence if the facts of record show that it is sustainable as a proper exercise of discretion. *See* ***State v. Stenzel***, 2004 WI App 181, ¶¶6-9, 276 Wis. 2d 224, 688 N.W.2d 20. We find no basis upon which to conclude that the circuit court erroneously exercised its sentencing discretion and conclude that any such argument would be without merit.

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