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October 30, 2013

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

2013AP1634-CRNM State of Wisconsin v. Wesley D. Boelter (L.C. #2012CF28)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

Wesley D. Boelter appeals from a judgment of conviction for child enticement. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Boelter received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed

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

because there is no arguable merit to any potential issue that Boelter would seek to raise on appeal. *See* RULE 809.21.

Boelter was originally charged with second-degree sexual assault and sexual assault of a child under sixteen years of age for acts involving two different victims on two different dates. A third charge, child enticement, was included in an amended information filed the day Boelter entered a no-contest plea to that charge.[2] As part of the plea agreement, the prosecution agreed to recommend probation as long as Boelter did not commit any new offenses while on release pending sentencing.[3] Before sentencing, the prosecution filed a memorandum indicating that Boelter had engaged in conduct which constituted bail jumping and that the agreed upon sentencing recommendation was no longer valid. Boelter was sentenced to three and one-half years' initial confinement and six and one-half years' extended supervision.

The no-merit report first addresses the potential issue of whether Boelter's plea was freely, voluntarily and knowingly entered. Except as discussed below, we agree with the assessment that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

[2] Pursuant to the plea agreement, the two sexual assault charges were dismissed as read ins at sentencing.

[3] The written plea questionnaire did not recite that the prosecution's recommendation was conditioned on there being no new offenses. That condition was recited at the plea hearing and Boelter's attorney confirmed that the agreement was correctly stated.

During a plea colloquy a circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). Here the circuit court indicated that it had read the criminal complaint and found there was a sufficient factual basis for the acceptance of the plea to child enticement.[4] "If the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea." ***State v. Black***, 2001 WI 31, ¶4, 242 Wis. 2d 126, 624 N.W.2d 363.

The first element of the crime of child enticement is that the defendant caused the victim to go into a secluded place. *See* WIS JI—CRIMINAL 2134. As to that element the criminal complaint recites the victim's statement that:

> she was at her house between approximately 4:00 and 5:00 and went into the backyard to get something and [Boelter] followed her back there. She stated when they were in the backyard, she willingly started to kiss [Boelter], at which time he pushed her to the ground and proceeded to get on top of her while she was telling him no.

Although the backyard of the victim's home constitutes a secluded place,[5] it appears that the complaint does not provide a factual basis that Boelter caused the victim to go to the backyard.[6] The conviction results from a plea bargain dismissing a charge of sexual assault of a child regarding the same victim. "[W]hen a plea is pursuant to a plea bargain, the trial court is

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[4] The defense indicated that it did not agree with all the facts stated in the complaint but believed "there's sufficient facts for a basis of this plea."

[5] The secluded place need not be a location completely removed from the public and the element is satisfied if some aspect of the location lowers the likelihood of detection. ***State v. Pask***, 2010 WI App 53, ¶¶15-16, 324 Wis. 2d 555, 781 N.W.2d 751.

[6] Boelter's no-contest plea would not preclude him from claiming on appeal that the facts he admitted did not constitute the crime to which he pled. *See* ***State v. Higgs***, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999); ***State v. Merryfield***, 229 Wis. 2d 52, 60-61, 598 N.W.2d 251 (Ct. App. 1999).

not required to go to the same length to determine whether the facts would sustain the charge as it would if there was no plea bargain." ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994). In the context of a negotiated plea, a defendant can enter a no-contest plea to any crime which is reasonably related to a more serious crime for which a factual basis exists. *See* ***id.*** Here the child enticement charge arises out of the same course of conduct as the more serious charge of sexual assault of a child and is, therefore, reasonably related. Since the allegations of the complaint which led to the child enticement conviction provided a factual basis for the dismissed sexual assault of a child charge, a factual basis for the no-contest plea existed. There is no arguable merit to a challenge to the factual basis to support the plea.

The no-merit report also discusses whether the sentence was the result of an erroneous exercise of discretion. The report sets forth the proper standard of review and the presumption that the sentencing court acts reasonably. The sentencing court stated the objective of the sentence was to protect the public and provide the youthful Boelter a rehabilitative opportunity to ingrain moral responsibility. The sentence is based on proper objectives. ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (the basic objectives of the sentence include the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others). There is no arguable merit to a claim that the sentence was an erroneous exercise of discretion. Additionally, the ten-year sentence was well within the twenty-five-year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

Although the sentencing court did not speak to the DNA surcharge, the judgment of conviction includes the $250 DNA surcharge. Boelter filed a postconviction motion to correct the judgment of conviction to remove the surcharge because the court had not actually imposed it and no reasons were given for its inclusion on the judgment. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (where the decision to impose the surcharge is discretionary, the trial court must explain its decision to impose it). The prosecutor filed a response to the motion asking the court to make a determination as to whether the surcharge should be ordered as indicated on the judgment. The court denied the postconviction motion without explanation. The no-merit report correctly acknowledges that there is arguable merit to an appeal from the denial of the postconviction motion but indicates that Boelter decided to waive his right to appeal the DNA surcharge issue. Boelter does not refute that representation.

Our review of the record discloses no other potential issues for appeal.[7] Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Boelter further in this appeal.

[7] At the time of his plea, defense motions for discovery of one victim's records and to sever the charges were pending. By entry of his no-contest plea, Boelter elected to abandon those motions. *See* ***State v. Woods***, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988) (motion made but not pursued is abandoned). Further, by his no-contest plea Boelter forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Wesley D. Boelter in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals