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November 5, 2013

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

2013AP468-CRNM State of Wisconsin v. Timothy L. Mann (L.C. # 2011CF122)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Timothy Mann has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ concluding no grounds exist to challenge Mann's convictions for exposing genitals to a child and sexual intercourse with a child age sixteen or older. Mann was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

An Amended Information charged Mann with exposing genitals to a child; sexual intercourse with a child age sixteen or older; and two counts of second-degree sexual assault—one count by use of force and the other with an unconscious victim. In exchange for his guilty pleas to exposing genitals and sexual intercourse with a child, the State agreed to dismiss the remaining counts. Both sides, however, remained free to argue at sentencing. With respect to Mann's conviction for exposing his genitals, the court withheld sentence and placed Mann on three years' probation. The court imposed the maximum nine-month jail sentence on Mann's conviction for sexual intercourse with a child.

The record discloses no arguable basis for withdrawing Mann's guilty pleas. The court's plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Mann completed, informed Mann of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. The court also inquired whether Mann had, in fact, committed the charged crimes. *See* WIS. STAT. § 971.08(1)(b). Mann answered affirmatively. Although the court failed to inform Mann that it was not bound by the terms of the plea agreement, as required under *State v. Hampton*, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14, Mann received the benefit of the plea agreement. Therefore, this defect in the colloquy does not present a manifest injustice warranting plea withdrawal, and the error was harmless. *See State v. Johnson*, 2012 WI App 21, ¶¶12, 14, 339 Wis. 2d 421, 811 N.W.2d 441.

We also note that the circuit court failed to personally advise Mann of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). A potential issue would arise if Mann could show that the pleas are likely to result in his “deportation, exclusion from admission to this country or denial of naturalization.” See WIS. STAT. § 971.08(2); see also *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. The record reveals, however, that Mann is a citizen of the United States not subject to deportation. Any challenge to the pleas on this basis would therefore lack arguable merit. Ultimately, the record shows the pleas were knowingly, voluntarily and intelligently made. See *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The no-merit report indicates that Mann emphasized factual discrepancies between the victim’s police statement and her preliminary hearing testimony. To the extent Mann challenges the victim’s credibility, his valid guilty pleas were a waiver of the right to present all nonjurisdictional defects and defenses. See *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Mann’s character; the need to protect the public; and the mitigating factors Mann raised. See *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Mann’s sentence is so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). To the extent the no-merit report questions whether the court properly considered other acts evidence that would have been excluded had there been a trial, a sentencing court may consider uncharged and unproven

offenses in assessing a defendant's character. *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

Any challenge to the requirement that Mann register as a sex offender would lack arguable merit. The court properly exercised its discretion when requiring Mann to register as a sex offender. The court made specific findings that the crime was sexually motivated and that it would be in the interest of public protection to have Mann report. *See* WIS. STAT. § 973.048(1m). We also conclude there is no arguable basis for challenging the imposition of the DNA analysis surcharge. In *State v. Cherry*, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393, this court held that a sentencing court must exercise its discretion when determining whether to impose the surcharge under WIS. STAT. § 973.046(1g). Here, the court properly exercised its discretion by considering the specific circumstances of Mann's case, noting that the surcharge was appropriate given the nature of Mann's conduct in this case.

Finally, there is no arguable merit to a claim that Mann was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, Mann must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The no-merit report indicates that Mann alleges counsel was ineffective by failing to correct errors in the presentence investigation report. Counsel, however, corrected errors in the PSI at the sentencing hearing. Mann also asserted his counsel was ineffective by failing to obtain an independent PSI. This claim of ineffectiveness is necessarily based on speculation that an independent PSI may have affected the outcome of the sentencing hearing. Speculation about

what the result of the proceeding might have been is insufficient, however, to establish prejudice. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a *Machner*² hearing.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Linda J. Schaefer is relieved of further representing Mann in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).