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DISTRICT II

November 6, 2013

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

2013AP1077-CRNM State of Wisconsin v. Luis T. Cruz (L.C. #2011CF122)

Before Brown, C.J., Neubauer, P.J. and Gundrum, J.

Luis T. Cruz appeals from a judgment of conviction for second-degree sexual assault of a child under age sixteen. 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). Cruz received a

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

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, the supplemental no-merit report counsel was ordered to file, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Cruz was charged with sexually assaulting his two children when they were ten and twelve years old. The original charges were for first-degree sexual assault of a child. Pursuant to a plea agreement, Cruz entered a no-contest plea to an amended charge of second-degree sexual assault by sexual contact with a child under age sixteen. The other first-degree sexual assault charge was dismissed as a read-in at sentencing. Sentencing immediately followed the acceptance of the plea. Both the prosecutor and Cruz made the agreed upon joint sentencing recommendation for five years' initial confinement and ten years' extended supervision. Cruz was sentenced to nine years' initial confinement and fifteen years' extended supervision. A $1,000 fine was also imposed, and Cruz was ordered to pay court costs, including the cost of extraditing him from Missouri. All the financial obligations were satisfied from the $10,000 bail posted by Cruz's father and the remaining amount was returned to the father.

The no-merit report addresses the potential issues of whether Cruz's plea was freely, voluntarily and knowingly entered, whether there was a sufficient factual basis for the conviction, and whether the sentence was the result of an erroneous exercise of discretion. Our review of the record persuades us that these potential issues lack arguable merit.

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, summarizes the judge's duties during the plea colloquy. During the plea hearing the circuit court fulfilled each

of those duties. An element of the crime involving sexual contact with a child is that the defendant acted with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim. *See* WIS JI—CRIMINAL 2101A, 2104. Because the plea questionnaire and trial counsel's explanation of what elements were explained to Cruz did not mention the purpose of the sexual contact, we required appellate counsel to file a supplemental no-merit report discussing whether Cruz understood the purpose element of the offense. Appellate counsel explains that there is no sufficient basis to allege that Cruz did not understand the definition of sexual contact when he entered his no-contest plea.[2] A motion to withdraw a plea is only meritorious if the defendant can allege that he or she did not know or understand that aspect of his or her plea that is related to a deficiency in the plea colloquy. ***Brown***, 293 Wis. 2d 594, ¶62. Cruz cannot make the required allegation, and there is no arguable merit to a claim that his plea was not knowingly entered.

The no-merit report properly observes that the child's preliminary hearing testimony established a factual basis for the conviction. Cruz stipulated that the trial court could rely on that testimony.

[2] In response to our order for a supplemental no-merit report on this issue, appellate counsel filed an affidavit recounting that on two occasions she consulted with Cruz by telephone as to the elements of the offense utilizing WIS JI—CRIMINAL 2101A, 2104, and Cruz's understanding of those elements. One conversation predated the filing of the no-merit report and one occurred after and in response to our order for a supplemental no-merit report. Appellate counsel's affidavit also indicates that Cruz does not wish to withdraw his plea.

At sentencing, the court touched upon each of the basic objectives of sentencing—the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. Acknowledging that the joint recommendation for five years was to keep Cruz confined until both his victims reached the age of eighteen, the court explained that a longer sentence was necessary to give the youngest victim adequate protection as a young adult. The court also determined that a sentence longer than five years was necessary to punish Cruz and provide for treatment. The court explained that a longer period of supervision was needed to guard against relapse in Cruz's lifelong struggle with alcohol. The record reflects that the sentencing court's discretionary decision had a "rational and explainable basis." ***Id.***, ¶76 (citation omitted). The court also gave a rationale for imposing the fine as an additional aspect of punishment and determined that the fine could be satisfied by the posted bail. *See* ***State v. Ramel***, 2007 WI App 271, ¶¶14-15, 306 Wis. 2d 654, 743 N.W.2d 502 (the sentencing court must give some explanation of why the court imposes the fine and must consider the defendant's ability to pay the fine during the total sentence). In as much as the twenty-four year sentence is well within the maximum of forty years, it 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."). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

Our review of the record discloses no other potential issues for appeal.[3] Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Cruz further in this appeal.

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 Erica L. Bauer is relieved from further representing Luis T. Cruz in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] A motion to suppress statements was filed but not ruled on. At a subsequent status hearing, trial counsel indicated that Cruz had not given any statements to police other than denials. It appears the motion was withdrawn. In any event, by his no contest plea Cruz 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.