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November 11, 2013

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

2012AP1355-CRNM State of Wisconsin v. Scott J. Podgorski (L.C. # 2009CF906)

Before Lundsten, Higginbotham and Sherman, JJ.

Scott Podgorski appeals a judgment convicting him of repeated sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.025(1)(e). Attorney Jo Vandermause 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 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 97-98, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988).

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

The no-merit report addresses the plea and sentencing. Podgorski 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 actually 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, 266-72, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Podgorski entered his plea pursuant to a negotiated plea agreement, the terms of which were presented in open court. In exchange for Podgorski's plea, charges of child abuse and disorderly conduct from another case, Marathon County Circuit Court case number 2009CF899, were dismissed but read in. The circuit court conducted a standard plea colloquy, inquiring into Podgorski's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Podgorski's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, 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 Podgorski understood that the agreement was between Podgorski and the State, and that the court would not be bound by the terms of the agreement. In addition, Podgorski provided the court with a signed plea questionnaire. Podgorski 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 went over with Podgorski the facts alleged in the complaint and how they related to the elements of the offense—namely, that Podgorski engaged in at least three acts of sexual intercourse with the same child, who was under the age of sixteen, that Podgorski knew that the child was under the age of sixteen, and that the acts took place between July 1, 2009 and November 21, 2009. There is nothing in the record to suggest that counsel's performance was in any way deficient, and we have found no basis in the record that would give rise to a manifest injustice. Therefore, Podgorski's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Podgorski'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 Podgorski was afforded an opportunity to comment on the PSI and to address the court personally, which he did. 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. Regarding the severity of the offense, the court noted the age gap between the parties and vulnerability of the fifteen-year-old victim. The court also noted that Podgorski had choked and slapped the victim when she wanted to end the

relationship, and had been deceitful with the victim's mother and with police when they confronted him about the relationship. With respect to Podgorski's character, the court stated that Podgorski has a good education, but lacks insight regarding his relationship with the victim. The court also stated that Podgorski has a substance abuse problem. The court identified the primary goal of sentencing in this case as deterrence and treatment, and concluded that a prison term was necessary to accomplish those goals, given the seriousness of the offense.

The court then sentenced Podgorski to six years of initial confinement and five years of extended supervision. The court also awarded five days of sentence credit and ordered alcohol and drug treatment. The judgment of conviction reflects that the court determined that the defendant was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 948.025(1)(e) and 948.02(2) (classifying repeated sexual assault of a child under the age of sixteen 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). The sentence imposed in this case represented just over one-fourth of the maximum sentence for the offense. 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 it right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting other sources).

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 WIS. STAT. RULE 809.32 and ***Anders***.

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