OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

November 19, 2013

To:

Hon. Kevin E. Martens
Circuit Court Judge
Safety Building Courtroom, # 502
821 W. State Street
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Andrea Taylor Cornwall
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Kaitlin A. Lamb
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Manuel Rodriguez 574711
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2012AP1440-CRNM State of Wisconsin v. Manuel Rodriguez (L.C. # 2010CF3080)

Before Lundsten, Sherman and Kloppenburg, JJ.

Attorney Kaitlin Lamb, appointed counsel for Manuel Rodriguez, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Rodriguez's guilty plea to one count of first-degree

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

sexual assault of a child and one count of repeated sexual assault of the same child, or to the sentence imposed by the circuit court. Rodriguez has responded to the no-merit report, arguing that: (1) Rodriguez's plea was not knowing, intelligent and voluntary; (2) the circuit court erroneously exercised its discretion by imposing consecutive sentences of ten and fifteen years; and (3) Rodriguez's trial counsel was ineffective. Counsel has filed a supplemental no-merit report addressing those claims. Upon independently reviewing the entire record, as well as the no-merit reports and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Rodriguez was charged with two counts of first-degree sexual assault of a child and one count of repeated sexual assault of the same child. Pursuant to a plea agreement, Rodriguez pled guilty to one count of first-degree sexual assault of a child and one count of repeated sexual assault of the same child, and the other count of first-degree sexual assault of a child was dismissed and read-in for sentencing purposes. As part of the plea agreement, the State agreed to recommend a total of twelve years in prison and ten years of extended supervision. The court sentenced Rodriguez to consecutive sentences of ten years' imprisonment on the first-degree sexual assault of a child conviction, and a bifurcated sentence of ten years of initial confinement and five years of extended supervision on the repeated sexual assault of the same child conviction.[2]

[2] Rodriguez was convicted of committing first-degree sexual assault of a child between January 1998 and January 1999, and thus received an indeterminate sentence as to that conviction. *See* WIS. STAT. §§ 948.02(1); 939.50(3)(b); and 973.01(1) (1997-98). He was convicted of committing repeated sexual assault of the same child between October 2003 and April 2004, and thus received a bifurcated sentence as to that conviction. *See* WIS. STAT. §§ 948.025(1)(a); 939.50(3)(b); and 973.01(1) (2003-04).

First, the no-merit report addresses whether there would be arguable merit to a challenge to Rodriguez's plea. A postsentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Rodriguez and determine information such as Rodriguez's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.

Rodriguez argues that his plea was not knowing, intelligent and voluntary because he was never informed that he faced a mandatory minimum sentence of twenty-five years under WIS. STAT. § 939.616. However, as counsel points out in her supplemental no-merit report, the mandatory minimum for child sex offenses was enacted in 2006, by 2005 Wis. Act 430, § 1. Because Rodriguez was not charged with any offense occurring after the mandatory minimum was enacted, the mandatory minimum did not apply to him.

Rodriguez also contends that his plea was not knowing, intelligent and voluntary because he has a limited understanding of the English language and there was no interpreter present at his plea hearing. Again, we agree with counsel that a challenge to Rodriguez's plea on this basis would lack arguable merit. As counsel identifies, Rodriguez does not state that there was any information that he did not in fact understand based on language barriers. Counsel also informs us that she has perceived no language barriers in English-language communications with Rodriguez, which have been both oral and written. We note as well that all of the hearings in this case were conducted entirely in English, without an interpreter, and our review of the record

does not indicate that Rodriguez had any difficulty understanding or responding to questions from the court. Based on the record, the no-merit reports, and the no-merit response, we perceive no arguable merit to a claim that Rodriguez's plea was involuntary based on the lack of an interpreter at the plea hearing.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Rodriguez's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered the facts relevant to the standard sentencing factors and objectives, including the gravity of the offense, Rodriguez's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range. R-23. *See* WIS. STAT. §§ 948.02(1) and 939.50(3)(b) (1997-98); and WIS. STAT. §§ 948.025(1)(a), 939.50(3)(b) and 973.01(2)(b)1. (2003-04). The sentence was well within the maximum Rodriguez faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Rodriguez seventy-three days of sentence credit, on defense counsel's request.

Rodriguez argues that the circuit court erroneously exercised its sentencing discretion because it sentenced Rodriguez without Rodriguez being informed that he would be subject to the mandatory minimum for child sex offenses. However, as we have explained, the mandatory minimum did not apply to Rodriguez. We discern no erroneous exercise of the court's sentencing discretion.

Rodriguez then contends that his trial counsel was ineffective by failing to identify that Rodriguez was never informed of the mandatory minimum. Under ***Strickland v. Washington,*** 466 U.S. 668, 687-694 (1984), a claim of ineffective assistance of counsel "must show that counsel's performance was deficient … [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Because that mandatory minimum did not apply, counsel was not ineffective by failing to identify that issue.

Rodriguez also argues that his trial counsel was ineffective by failing to investigate the following: (1) text messages by the victim in count one, sent to Rodriguez's granddaughter, stating that "Mother is going ballistic," "acting crazy," and "blowing all this out of proportion," and the victim's statement to Rodriguez's granddaughter that the victim refused to talk to police on three occasions; (2) a statement by the victim in count two, made to Rodriguez's daughter, that "maybe what I thought happened really didn't happen"; and (3) information that the victim in count three was placed in Rodriguez's care following the victim's claim that she had been sexually assaulted in her previous foster placement, and that a physical examination of the victim revealed no sign of sexual assault.

Rodriguez asserts that he provided his trial counsel with the information he wanted counsel to investigate, but that counsel failed to investigate any of that information. Rodriguez asserts that counsel would have obtained proof of Rodriguez's innocence by investigating that information. It appears that Rodriguez is asserting that, had counsel obtained proof of his innocence, he would not have pled guilty to counts one and three.

We agree with counsel's assessment that a claim of ineffective assistance of counsel would lack arguable merit. To establish the prejudice prong of an ineffective assistance of counsel claim following a guilty plea, a defendant must show a reasonable probability that, absent counsel's errors, the defendant would have gone to trial rather than plead guilty. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). For the reasons that follow, we perceive no basis for an arguably meritorious claim that Rodriguez would not have pled guilty to counts one and three if counsel had investigated the information Rodriguez asserts in his no-merit response.

None of the facts Rodriguez claims counsel should have investigated would have provided evidence of Rodriguez's innocence. The claimed text messages by the victim as to count one would have indicated that the victim's mother was extremely upset upon learning of the sexual assault. They also may have indicated that the victim, who was a teenager by the time the criminal complaint was filed, was not as upset as her mother when her mother first learned of the assault, which occurred when the victim was five to six years old. The messages do not indicate the sexual assault did not occur. Similarly, evidence that the victim refused to speak to police on three occasions would not have established Rodriguez's innocence, particularly in light of the fact that the victim ultimately disclosed the sexual assault to police.

Next, even if it had been established that the victim as to count two had made a statement to Rodriguez's daughter that "maybe what I thought happened really didn't happen," that would not have established that the charged sexual assault did not occur. According to the complaint, which was filed when the victim was a teenager, the sexual assault occurred when the victim was four to five years old. Significantly, the victim was able to provide a detailed statement to police

as to that assault. One statement by the victim, apparently questioning her memory of the sexual assault, would not have established reasonable doubt that the assault did not occur.

Finally, evidence that the victim as to count three had previously made a claim of sexual assault and there was no supporting physical evidence would not have established that the assault did not occur in this case. If Rodriguez means that counsel should have obtained evidence that there was no physical proof of the sexual assault in count three, that argument lacks arguable merit as well. The charges in count three were based on allegations of touching, digital penetration, and oral sexual contact, which would not have been likely to result in physical evidence.

In sum, while Rodriguez asserts that counsel should have investigated facts that Rodriguez provided, none of those facts would have raised reasonable doubt that the charged sexual assaults occurred. Additionally, Rodriguez does not indicate what other information would have been revealed if counsel had investigated any of the information he provided. We perceive no reasonable probability that Rodriguez would have insisted on going to trial on all three counts, rather than pleading to counts one and three and having count two dismissed and read-in, if counsel had investigated that information.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Lamb is relieved of any further representation of Rodriguez in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals