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December 18, 2013

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

2013AP308-CRNM State of Wisconsin v. Mario D. Rodriguez (L.C. # 2010CF1578)

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

Mario Rodriguez appeals from a judgment convicting him of possession of child pornography contrary to WIS. STAT. § 948.12(1m) (2009-10). Rodriguez's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Rodriguez received a copy of the report and filed a response. Counsel filed a RULE 809.32(1)(f) supplemental no-merit report. Upon consideration of the no-merit

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

report, counsel's supplemental no-merit report, Rodriguez's response, and after an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Rodriguez's guilty plea was knowingly, voluntarily, and intelligently entered and had a factual basis and (2) whether the circuit court misused its discretion when it imposed a six-year term consisting of three years of initial confinement and three years of extended supervision. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty plea, Rodriguez answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Rodriguez's guilty plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Rodriguez signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Rodriguez's guilty plea.

In his response to counsel's no-merit report, Rodriguez seeks to withdraw his guilty plea because it was not intelligently and voluntarily entered. He argues that he has a learning disability and it was hard for him to understand the proceeding. As we have held above, the record does not disclose any defects in the plea colloquy. Moreover, on more than one occasion, the circuit court confirmed that Rodriguez understood the plea proceeding and did not have any questions. Rodriguez's claimed lack of understanding is at odds with the record he created in the circuit court.

To seek plea withdrawal in the absence of a plea colloquy defect, Rodriguez must allege that he did not understand information conveyed at the plea colloquy and that if he had understood that information, he would have pled differently. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Counsel's supplemental no-merit report addresses this issue and confirms that Rodriguez cannot make the allegation necessary to challenge his guilty plea.

In his WIS. STAT. RULE 809.32(1)(f) affidavit, counsel demonstrates that a motion to withdraw Rodriguez's guilty plea would lack arguable merit. Counsel avers that Rodriguez told him he did not understand that at a trial, he would have the right to subpoena witnesses and cross-examine the State's witnesses.[2] Counsel reports that Rodriguez takes the following position:

> [Rodriguez] said that had he understood those rights, he would not have pled guilty. [Counsel] asked Mr. Rodriguez why he would've gone to trial had he known he had those rights. Mr. Rodriguez stated that knowing those rights would not have changed his

[2] The circuit court specifically discussed these rights with Rodriguez at the plea hearing, and Rodriguez advised the circuit court at that time that he understood these rights.

> decision, but he would not have pled guilty because he now regrets the decision to enter a plea.

Postsentencing, a defendant must show that plea withdrawal is necessary to correct a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶9, 347 Wis. 2d 30, 829 N.W.2d 482. Having regrets about entering a guilty plea is not sufficient to demonstrate a manifest injustice. The record and counsel's affidavit confirm that a plea withdrawal motion would lack arguable merit.[3]

In his response to counsel's no-merit report, Rodriguez asserts various defenses: he never downloaded child pornography, someone else must have used his computer to download the pornography because his computer was not password-protected, and his former girlfriend lied about the child pornography on his computer.[4] Rodriguez waived these defenses when he pled guilty. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984) (a guilty plea waives the right to raise nonjurisdictional defects and defenses).

In his response, Rodriguez states that he falsely confessed to police because he was scared and nervous. The criminal complaint states that Rodriguez confessed after he received his ***Miranda***[5] rights. Counsel's supplemental no-merit report confirms that the videotape of the interview establishes that Rodriguez waived his ***Miranda*** rights and there was no coercive or improper police conduct. ***State v. Jerrell C.J.***, 2005 WI 105, ¶19, 283 Wis. 2d 145, 699 N.W.2d

[3] Rodriguez has not disputed appellate counsel's WIS. STAT. RULE 809.32(1)(f) affidavit.

[4] In his affidavit in support of his supplemental no-merit report, counsel advises that his investigator evaluated these claims. Rodriguez's girlfriend denied that she downloaded the child pornography to his computer. The girlfriend's younger brother also denied any involvement. The discovery materials in the case indicate that only one user, "Mario," created the internet search history that included the child pornography.

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

110.[6] Rodriguez does not allege any conduct by the police that would have rendered his inculpatory statements involuntary. We agree with appellate counsel that there was nothing about the interview that would provide a basis to suppress Rodriguez's inculpatory statements to police.

We observe that Rodriguez's disavowal of his confession is at odds with the admissions he made at the plea hearing and sentencing. However, it is consistent with the pattern revealed by the record: Rodriguez repeatedly claimed innocence or that he must have been intoxicated when he downloaded the child pornography only to subsequently acknowledge that he committed the crime. At sentencing, the circuit court did not find credible Rodriguez's claim that he did not recall committing the crime because he was intoxicated.

We turn to Rodriguez's sentence. The record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Rodriguez to a six-year term. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the seriousness of the offense, Rodriguez's character and history of other offenses, and the need to protect the public. The court stated reasons for refusing to consider the Challenge Incarceration Program, the Earned Release Program, or a risk reduction sentence. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The court properly considered the dismissed and read-in offenses. The court also

[6] Although there are scattered references to mental illness in the record, Rodriguez clarified for the circuit court that these references related to prior treatment for alcohol abuse.

considered the proper factors when it required Rodriguez to register as a sex offender for fifteen years. WIS. STAT. § 973.048(1m)(a) and (3). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

The circuit court stated reasons for requiring Rodriguez to pay the DNA surcharge under WIS. STAT. § 973.046. ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. No issue of arguable merit could arise from a challenge to the imposition of the DNA surcharge.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Dustin Haskell of further representation of Rodriguez in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dustin Haskell is relieved of further representation of Mario Rodriguez in this matter.

Diane M. Fremgen
Clerk of Court of Appeals