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January 8, 2014

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

2013AP717-CRNM State of Wisconsin v. Jarrett J. Pollari (L.C. #2011CF958)

Before Neubauer, P.J., Reilly and Brennan, JJ.

Jarrett J. Pollari appeals from a judgment of conviction entered upon his plea to one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1)(e) (2011-12).[1] Pollari's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Pollari received a copy of the report, and filed a response. Upon consideration of the no-merit report, Pollari's response, and our independent

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

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.

According to the criminal complaint, Pollari lived with the family of the victim, APS, from about June 2008 through August 2010. In 2011, APS, who was born in 2000, reported that while living with the family, Pollari had repeatedly sexually assaulted her by digitally penetrating her vagina. The State charged Pollari with three counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(b), which prohibits sexual intercourse with a child less than twelve years old. Because Pollari was at least eighteen years old during the charging period, each count carried a mandatory minimum bifurcated sentence of twenty-five years. *See* WIS. STAT. § 939.616(1r) and (3).

Pollari waived his statutory right to a preliminary hearing and following bindover, the State filed an information charging the original three counts. Trial counsel informed the court that Pollari expected to resolve the case short of trial, and a plea hearing date was scheduled. On May 29, 2012, in front of a reserve judge and pursuant to the parties' negotiated settlement, Pollari entered a no-contest plea to count one. The plea agreement required the State to move to dismiss and read in counts two and three, and to "strike" the mandatory minimum penalty. The parties would then be free to argue the appropriate sentence.

On July 16, 2012, Pollari appeared for sentencing in front of the assigned judge. After it was made aware of the plea agreement, the trial court opined that unlike a repeat offender sentence enhancer, the mandatory minimum sentence could not be stricken or dismissed as part of a plea agreement. The State expressed its willingness to amend the charge to "first degree

sexual assault involving sexual contact." The court told trial counsel that she would "need to speak with [her] client outside the presence of the court" and added:

> We'll need the [S]tate to get an amended information up here. I will retake a plea, you'll need to go through a plea form again, we'll take the plea this afternoon, and then I would be inclined to order a presentence investigation. But you need to confer with your client first.

The trial court went off the record to allow the parties to confer, and so that Pollari could speak privately with trial counsel.

After the recess, the State filed an information amending count one to a violation of WIS. STAT. § 948.02(1)(e), first- degree sexual assault of a child predicated on sexual contact with a child under thirteen.[2] Trial counsel filed a newly completed and signed plea form attaching the elements of first-degree sexual assault based on sexual contact under paragraph (e). The trial court expressly ascertained Pollari's understanding of the amended charge, including its essential elements, and that its purpose was to avoid a mandatory minimum sentence. The trial court personally addressed Pollari and ascertained his understanding that he would be "re-entering a plea to a different charge[,]" and that he could instead choose not to plead and exercise his right to a jury trial. During the plea colloquy, it became clear that though Pollari wished to accept the plea agreement, he denied having sexually assaulted the victim. The trial court permitted Pollari

[2] The WIS. STAT. § 939.616(1r) mandatory minimum sentence does not apply to violations under this paragraph.

to enter an ***Alford***[3] plea. The trial court accepted the plea, found Pollari guilty, and dismissed but read in counts two and three.

On November 15, 2012, at the scheduled sentencing hearing, the victim's mother provided an oral statement, and Pollari presented his allocution. The presentence investigation (PSI) recommended a bifurcated sentence totaling ten to thirteen years, with seven to nine years of initial confinement and three to four years of extended supervision. The State recommended "confinement and extended [supervision] in amounts deemed appropriate" by the court, and the defense recommended no more than three years in prison. The trial court imposed a twenty-four year bifurcated sentence, with twelve years of initial confinement and twelve years of extended supervision.

The no-merit report addresses whether there is any basis for a challenge to the validity of Pollari's ***Alford*** plea and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The record demonstrates that at the July 16, 2012 hearing, the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court specifically ascertained Pollari's understanding of the nature of and factual basis for the amended charge, the constitutional rights waived by an ***Alford*** plea, the parties' plea agreement, and that the court was

[3] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

not bound by the parties' agreement or recommendations. The trial court correctly recited the maximum penalty and explained the significance of read-in charges. The court drew Pollari's attention to the plea questionnaire filed on July 16, 2012, and ascertained that he had reviewed and signed the form, and understood its contents. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea). The form and its attachments correctly stated the elements of the offense and the constitutional rights waived by an ***Alford*** plea. Though the trial court did not read the deportation warning contained in the plea questionnaire, the record establishes that Pollari was born in Milwaukee, Wisconsin. Nothing in the record suggests that Pollari's plea "is likely to result in … deportation, exclusion from admission to this country, or denial of naturalization[.]" WIS. STAT. § 971.08(2); ***State v. Douangmala***, 2002 WI 62, ¶¶3–4, 253 Wis. 2d 173, 176, 646 N.W.2d 1 (plea withdrawal permitted when court omits § 971.08(1)(c) warnings if defendant shows plea likely to result in deportation, exclusion from admission, or denial of naturalization). Finally, the trial court properly determined that there was factual basis in the criminal complaint for the offense of conviction, and, because Pollari entered an ***Alford*** plea, made a finding that there was "strong evidence of guilt." *See* ***State v. Smith***, 202 Wis. 2d 21, 27-28, 549 N.W.2d 232 (1996) (with ***Alford*** plea, there must be strong proof of guilt as to each element of crime). No issue of merit exists from the July 2012 plea taking.

The other issue counsel addresses is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is committed to the trial court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion). Here, in fashioning its sentence, the

court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered the crime to be aggravated by the victim's young age, the age discrepancy between Pollari and the victim, the repeated nature of the assaultive behavior, and that the victim was assaulted in her own home. The trial court also considered myriad mitigating factors, including that Pollari had no prior criminal or juvenile record, graduated from high school, was employed, and was relatively young, without "the same mature judgment that [older adults] have." The trial court considered the recommendations of the parties and the PSI, but determined that those recommendations did not sufficiently protect the public or account for the seriousness of the offense.

In his response to the no-merit report, Pollari states that "[w]hile there may have been no procedural errors, I believe that the sentence length I received was exceedingly harsh." On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination." ***Gallion***, 270 Wis. 2d 535, ¶18. We will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. In this case, the trial court identified proper objectives, considered relevant factors, explained its process, and reached a reasonable conclusion. Though it acknowledged a number of mitigating circumstances related to Pollari's character, in the end, it permissibly focused on the aggravated nature of the offense. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23 (the weight to be given to each factor is committed to the trial court's discretion). There is no meritorious challenge to the trial court's exercise of sentencing discretion.

Further, we cannot conclude that the sentence imposed was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it is "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, 255 Wis. 2d 632, 648 N.W.2d 507. There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id***. at ¶¶31-32. Here, the twenty-four year bifurcated sentence was well below the sixty-year maximum authorized by statute, and is not so excessive or unusual as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved from further representing Jarrett J. Pollari in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals