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March 24, 2014

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

2013AP239-CRNM State of Wisconsin v. David R. Haug (L.C. #2011CF1793)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

David Haug appeals a judgment convicting him of third-degree sexual assault. Attorney Andrew Hinkel has filed a no-merit report seeking to withdraw as appellate counsel.[1] *See* WIS. STAT. RULE 809.32 (2011-12);[2] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*,

[1] Attorney Martha Askins has since replaced Attorney Hinkel, and has not withdrawn the no-merit report.

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

486 U.S. 429 (1988). The no-merit report addresses the validity of Haug's plea and sentence. Haug 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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 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.

Haug entered a guilty plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Haug's plea, the State agreed to dismiss and read in an additional felony count of intentionally subjecting an individual at risk to abuse, to cap its sentencing recommendation at three years of initial confinement, and to consider a recommendation of probation with conditional jail time depending on the PSI. The State followed through on its agreement. The plea agreement reduced Haug's sentence exposure by three and a half years.

The circuit court conducted a standard plea colloquy, inquiring into Haug's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Haug's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, 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 Haug understood that the court would not be bound by any sentencing recommendations. In addition, Haug provided the court with a signed plea questionnaire. Haug 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 facts set forth in the complaint—namely, that Haug had intercourse with a developmentally disabled man—provided a sufficient factual basis for the plea. Haug indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Haug has not alleged any other facts that would give rise to a manifest injustice. Therefore, Haug's plea was valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Haug'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. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Haug was afforded an opportunity to comment on the PSI and to address the court, both personally and through counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that the violent violation of a vulnerable person was too

serious a matter to consider probation. With respect to character, the court gave Haug credit for maintaining stable residency and for the absence of substance abuse problems. However, the court observed that Haug had not demonstrated a genuine acceptance of responsibility for his conduct, and the court viewed Haug's stated belief that the victim enjoyed the assault as a troubling indicator of future dangerousness. The court concluded that a prison term was necessary for purposes of punishment and deterrence.

The court then sentenced Haug to three years of initial confinement and five years of extended supervision. The court also awarded two days of sentence credit, and imposed standard conditions of supervision recommended in the PSI. The judgment of conviction reflects that the court determined that Haug was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The components of the bifurcated sentence were within the applicable penalty ranges, and the total imprisonment period constituted 80% of the maximum exposure Haug faced. *See* WIS. STAT. §§ 940.225(3) (classifying third-degree sexual assault as a Class G Felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony). 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 is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). That is particularly true when taking into consideration the impact of the crime on the victim and the amount of additional sentence exposure Haug avoided on the read-in offense.

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

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Martha Askins is relieved of any further representation of David Haug in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals