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April 1, 2014

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

2011AP2523-CRNM State of Wisconsin v. Joseph R. Mikkelson (L.C. #2010CF936)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Joseph Mikkelson appeals a judgment convicting him of sexual exploitation of a child. Attorney Leonard Kachinsky 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); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

of Mikkelson's plea and sentence. Mikkelson was sent a copy of the report, and has filed a response asserting several reasons he thinks he should be allowed to withdraw his plea, to which counsel has filed a supplemental report. Upon reviewing the entire record, as well as the no-merit report, response and supplement, we conclude that there are no arguably meritorious appellate issues.

First, we agree with counsel that Mikkelson's allegations are insufficient to warrant a plea withdrawal hearing. 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, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Mikkelson entered a no-contest plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Mikkelson's plea, the State agreed to dismiss two other felony counts and to recommend ten years of initial confinement and ten years of extended supervision. The plea agreement reduced Mikkelson's sentence exposure by eighty-five years, including a mandatory minimum initial confinement period of twenty-five years on a charge of first-degree sexual assault of a child under the age of twelve.

An initial plea hearing was adjourned when the parties realized that they did not have a jury instruction to use to advise Mikkelson of the elements of the subsection of the statute he was charged with violating. At the continued hearing, the parties presented the court with a jury instruction adapted from another subsection of the statute that they agreed accurately explained

the elements. The circuit court proceeded to conduct a plea colloquy using both the stipulated instruction and the actual text of the statute to explore the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure the defendant understood that it would not be bound by any sentencing recommendations. Mikkelson now complains that the circuit court "switched the language" and the meaning of the statute. He does not, however, point to any portion of the stipulated instruction that was in error, or articulate any misunderstanding of the elements that affected his decision to enter a plea.

The court explicitly advised Mikkelson of the constitutional rights he would be waiving by entering a plea, and asked whether Mikkelson had any questions about them. In addition to answering "no" to that question, Mikkelson provided the court with a signed plea questionnaire and indicated to the court that he understood the information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Mikkelson is not now claiming to have misunderstood any of his rights.

The court also inquired into the voluntariness of the plea decision and the defendant's ability to understand the proceedings. The court ascertained that the only pressure Mikkelson felt to enter a plea was that pressure inherent in his sentence exposure, particularly on the dismissed counts. The court gave Mikkelson the option of taking some extra time to speak with counsel, or of proceeding to trial, but Mikkelson choose to proceed.

Mikkelson now contends that trial counsel provided ineffective assistance by failing to investigate and allowing Mikkelson to enter a plea when the police had been unable to recover a photograph of the toddler from Mikkelson's cellphone. However, Mikkelson was well aware

before entering his plea that police had not recovered any photographic evidence, because that matter was discussed on the record at his initial adjourned plea hearing. The facts set forth in the complaint and discussed at the plea hearing—namely, that Mikkelson's wife had walked in on Mikkelson appearing to take a cell phone photograph of the exposed genitalia of a three-year-old girl who the Mikkelsons were babysitting—provided a sufficient factual basis for the plea.

Mikkelson has not alleged any other facts that would give rise to a manifest injustice. Therefore, Mikkelson's plea was valid and operated to waive all nonjurisdictional defects and defenses, including any challenge to the sufficiency of the State's proof. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Mikkelson'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 Mikkelson was afforded an opportunity to comment on the PSI—which he told the court he had read but had little time to review. The court offered to give the defendant additional time to review the PSI with counsel, but Mikkelson declined the offer. Mikkelson also presented his own alternate PSI and character witnesses, and he addressed the court both personally and through counsel. Mikkelson now argues that the court sentenced him based on inaccurate information regarding whether he engaged in the conduct underlying the dismissed charges. However, the court was well aware both that one of the PSI writers reported that Mikkelson had admitted that he had licked the girl's vagina as the child alleged in a recorded

interview, and that Mikkelson subsequently denied ever having made that admission. Resolving conflicting evidence is not the same as relying upon inaccurate information.

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, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that the victim fortunately did not appear to be suffering from the offense, but emphasized that the betrayal of trust impacted the rest of the family. With respect to character, the court viewed Mikkelson's history of verbal abuse of his family as sickening and noted that Mikkelson had failed to take advantage of prior periods of supervision to address his alcoholism. The court concluded that a substantial prison term was necessary to effectuate the primary goal of the sentencing in this case—namely, protection of the public and Mikkelson's family, as well as the secondary goal of giving the defendant a start on sobriety.

The court then sentenced Mikkelson to eight years of initial confinement and seven years of extended supervision. The court also awarded 207 days of sentence credit and imposed standard costs and conditions of supervision, including absolute sobriety and no unsupervised contact with minors. The court determined that the defendant was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence due to the nature of the offense.

The components of the bifurcated sentence imposed were within the applicable penalty ranges and the total imprisonment period constituted about 38% of the forty years Mikkelson faced. *See* WIS. STAT. §§ 948.05(1)(a) (classifying sexual exploitation of a child 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). 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.'" ***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 presumptive minimum sentence of five years' initial incarceration, which Mikkelson himself requested, the ten year initial incarceration recommendation under the plea agreement, and the amount of additional sentence exposure Mikkelson avoided on the read-in offenses.

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 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