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April 9, 2014

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

2013AP2404-CRNM State of Wisconsin v. Gary A. Viera (L.C. #2010CF847)

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

Gary A. Viera appeals a judgment entered upon his guilty plea to second-degree sexual assault by use of force, contrary to WIS. STAT. § 940.225(2)(a) (2011-12),[1] as a repeater and as party to a crime (PTAC). Viera'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). Viera was advised of his right to file a response but has elected not to do so. Upon consideration of the no-merit report

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

and our independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and that the appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment of conviction and relieve Attorney Urszula Tempska of further representing Viera in this matter.

Viera and his cousin forcibly, repeatedly, and at times simultaneously sexually assaulted a sixteen-year-old girl. Viera was charged with four counts (counts one through four) of first-degree sexual assault and one count (count five) of PTAC false imprisonment. After some negotiation, he entered a guilty plea to the amended count four, second-degree sexual assault by use of force, as a repeater and as PTAC. The parties agreed that the remaining counts would be dismissed and read in for sentencing.

Not a month later and still before sentencing, Viera moved to withdraw his plea. He claimed that he had not understood the severity of the charges or the elements of the crime because, besides a "long history of social and learning disorders," he had not taken his Attention Deficit Hyperactivity Disorder (ADHD) medication on the day of the plea hearing nor, in fact, at all during the twenty-one months he had been in jail. He also asserted that he felt pressured to plead and that the alleged victim had mutually pursued the sexual activity.

A hearing was held on the motion. Jerold Breitenbach, Viera's lawyer during the plea negotiations, testified that neither Viera nor his family members ever indicated that Viera took ADHD medication; that Viera never indicated he was not thinking clearly or had difficulty understanding concepts; that Viera always appeared "knowledgeable," "sharp," and "aware of what was going on"; that, as Viera knew that his cousin was dealt a sentence of twenty years' initial confinement (IC) and fifteen years' extended supervision (ES) after pleading guilty to two

similar counts, Viera wanted, but was not promised, a plea deal capping his sentence at "ten years total" and that Viera knew that, to plead, Viera would have to acknowledge that the sexual encounter was not consensual. Viera testified at the hearing that he signed the plea agreement believing he would get a three-to-five-year sentence, and conceded that he never requested ADHD medication. The court denied the motion. It later sentenced Viera to thirty years' imprisonment—fifteen years each of IC and ES. This no-merit appeal followed.

The no-merit report first considers whether the trial court erred in denying Viera's presentence motion to withdraw his guilty plea. A defendant should be allowed to withdraw his or her plea before sentencing "for any fair and just reason, unless the prosecution would be substantially prejudiced." ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted). The reason, which the court must find credible, must be something other than the desire to have a trial or belated misgivings about the plea. ***Id.***, ¶¶32, 43. The defendant must prove the reason by a preponderance of the evidence. ***Id.***, ¶32. Whether the reason given for the change of heart is adequate lies within the discretion of the court. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999).

The trial court found Viera's claims of confusion and incomprehension and his belief that he would receive a sentence of three to five years not credible. Noting that all the evidence pointed to Viera simply being "scared," the court concluded that Viera had only had a change of heart and had not shown a fair and just reason to withdraw his plea. Our review of the record supports the trial court's conclusion. The plea colloquy was careful and thorough. Viera expressed understanding at every turn. No arguable issue of merit could be raised.

The no-merit report next considers whether Viera could withdraw his plea postsentencing on grounds it was not knowingly, intelligently, and voluntarily entered. We agree with appellate counsel that there exists no issue of arguable merit.

Our independent review of the record satisfies us that Viera's guilty plea was knowing, intelligent, and voluntary. As noted, the trial court conducted a thorough, careful colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert,*** 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶¶24, 33, 38, 274 Wis. 2d 379, 683 N.W.2d 14. Besides the substantive colloquy, the court also properly looked to Viera's signed plea questionnaire. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. We also discern no viable claim that Viera was denied the effective assistance of counsel leading up to and during the plea taking so as to establish a "manifest injustice." *See* ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). No issue of merit could arise in relation to his pleas.

The report next addresses whether the sentence represented a proper exercise of the trial court's discretion. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court must provide a "rational and explainable basis" for the sentence imposed to allow this court to ensure that discretion in fact was exercised. ***Id.***, ¶¶39, 76 (citation omitted). The trial court must consider the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999), but the weight given to each factor is within the court's discretion, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

No basis exists to disturb the sentence imposed. The court weighed proper sentencing factors, applied them in a reasoned and reasonable manner, and provided a thorough and rational explanation for imposing the sentences it did. The court addressed the seriousness of the offense, the need to protect the public, and noted Viera's lesser involvement relative to that of his cousin. As Viera's exposure was forty years' imprisonment (twenty-five years' IC, fifteen years' ES), his sentence is not so excessive or unusual so as to shock public sentiment. *See* ***id.***; *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Further, any challenge to the court's order that he pay the DNA surcharge would be frivolous. The surcharge is mandatory for his crime. WIS. STAT. § 973.046(1r). Our review of the record discloses no other potential issues for appeal.

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 Urszula Tempska is relieved of further representing Viera in this matter.

Diane M. Fremgen
Clerk of Court of Appeals