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September 24, 2014

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

2014AP755-CRNM State of Wisconsin v. Marc M. Swan (L.C. #2012CF391)

Before Curley, P.J., Kessler and Brennan, JJ.

Marc M. Swan appeals from a judgment of conviction, entered upon his no-contest pleas, on one count of repeated sexual assault of a child and one count of incest with a child by a stepparent. Appellate counsel, Martha K. Askins, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Swan was advised of his right to file a response, but has not responded. Upon this court's independent review of

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

the record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Swan's stepdaughter, L.R.H., disclosed his inappropriate touching during a church retreat. Retreat personnel reported the disclosure to authorities and L.R.H.'s mother. West Bend police detective Travis Vickney was assigned to investigate. He made contact with L.R.H.'s mother and observed a forensic interview of L.R.H. The girl reported that Swan had, on multiple occasions, come into her room at night and rubbed her breasts or vagina, thinking she was asleep. She also reported that Swan would sometimes put a finger into her vagina.

L.R.H. further disclosed that Swan also had inappropriate contact with her older sister, A.L.H. West Bend police detective Eric Grinwald made contact with A.L.H., who reported one incident where she awoke to find Swan rubbing her breast. Grinwald suspected, however, that there were likely other incidents that A.L.H. was not ready to discuss.

Vickney and Grinwald went to Swan's house to talk to him. Swan, who was home alone, answered the door and invited the detectives in after they identified themselves and explained that they were there to discuss a complaint involving his stepdaughters. Eventually, Swan confessed to inappropriate contact with L.R.H. and A.L.H., and the detectives called a patrolman to take Swan into custody.

Swan was charged with one count of repeated sexual assault of a child for his contacts with L.R.H.; one count of second-degree sexual assault of a child under sixteen for his contact with A.L.H.; and two counts of incest with a child by a stepparent. Swan moved to suppress his statement to police, asserting a ***Miranda*** violation. *See* ***Miranda v. Arizona***, 384 U.S. 436

(1966). After a hearing, the circuit court concluded that Swan had not been in custody at the time he gave his statement and, thus, ***Miranda*** warnings were not required.

Swan then agreed to resolve his case with a plea agreement. In exchange for his no-contest pleas to the offenses involving L.R.H., the State would amend the repeated-sexual-assault charge to allege different predicate violations. The effect of the amendment would be to reduce the charge from a class B felony with a mandatory minimum twenty-five-year term of initial confinement to a class C felony with no mandatory minimum. *See* WIS. STAT. § 939.616(1r). The State also agreed to dismiss and read in the offenses involving A.L.H. and to recommend concurrent sentences, although it would be free to argue the length of those sentences. The circuit court accepted Swan's pleas and sentenced him to ten years' initial confinement and fifteen years' extended supervision on each of the two counts, to be served consecutively.

Counsel identifies three potential issues: whether the circuit court properly denied the suppression motion, whether there is any basis for a challenge to the validity of Swan's no-contest pleas, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

Swan gave a confession, which the detectives put into a written statement that Swan signed. It was undisputed that the detectives never informed Swan of his ***Miranda*** rights at any time during the interview. However, "[c]ustody is a necessary prerequisite to *Miranda* protections." ***State v. Lonkoski***, 2013 WI 30, ¶23, 346 Wis. 2d 523, 828 N.W.2d 552. A defendant who is not in custody is not entitled to suppression of his statements. *See* ***id.***, ¶24. When facts are undisputed, "'custody' is a matter of law." ***State v. Koput***, 142 Wis. 2d 370, 379, 418 N.W.2d 804 (1988). "The question is whether a reasonable person in [defendant's] situation

would have considered himself to be in custody." ***Id.*** at 380. "A person is in 'custody' if under the totality of the circumstances 'a reasonable person would not feel free to terminate the interview and leave the scene.'" ***Lonkoski***, 346 Wis. 2d 523, ¶6 (citation omitted).

We are satisfied that Swan was not in custody. Two detectives, wearing plain clothes and not uniforms, approached Swan at his home, identifying themselves and their purpose. Swan invited them in, and they sat at a dining table with Swan at the head of the table, one detective in the chair to his right and the other detective across the table from Swan. Swan's dog sat at his feet, and Swan was able to pet the dog throughout the interview. The detectives made no threats or promises. No restraints were employed nor shows of force made. Swan did not attempt to leave, except when he indicated he should go pick up his children from school. When the detectives informed him that his wife was handling that task, Swan did not press the matter. In addition, "a suspect's belief that he or she is the main focus of an investigation is not determinative of custody." ***Id.***, ¶34. Accordingly, based on the totality of the circumstances, *see* ***id.***, ¶28, there is no arguable merit to a claim that the circuit court erroneously denied the suppression motion.

There is no arguable basis for challenging whether Swan's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Swan completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. Attached to the form were the applicable jury instructions, setting out those elements. The form noted only a maximum penalty of forty years' imprisonment and a $100,000 fine. While that is the correct maximum for *each* of Swan's offenses, it is not the possible total sentence. However, the circuit court advised Swan that forty

years' imprisonment, a $100,000 fine, or both could be imposed for each charge, and Swan acknowledged that fact. The plea questionnaire form also specified the constitutional rights Swan was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, and largely complied with its colloquy obligations. Although it did not expressly review the constitutional rights Swan was waiving with his plea beyond the right to a jury trial, the circuit court did note that the rights were "listed right here on your plea questionnaire form" before confirming Swan understood he was waiving those rights. The express reference to the list on the form is, in this case, adequate. *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794.

The plea questionnaire and waiver of rights form, the jury instructions, and the court's colloquy appropriately advised Swan of the elements of his offenses and the potential penalties he faced, and otherwise generally complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary.[2] There is no arguable merit to a challenge to the pleas' validity.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

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[2] The circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c), and counsel does not address this omission in the no-merit report. However, the record reveals that Swan was born in Milwaukee and, thus, there is no arguably meritorious challenge to be raised. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Douangmala***, 2002 WI 62, ¶¶3-4, 253 Wis. 2d 173, 646 N.W.2d 1 (plea withdrawal permitted for § 971.08(1)(c) violation only if defendant shows plea is likely to have adverse immigration consequences).

At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court gave Swan credit for many things: he had no prior criminal history; he had a good work history; his upbringing was "not good," with Swan being sexually abused by his father; he was remorseful; he had stopped his own behavior before getting caught; and he admitted his behavior. However, while Swan's risk of recidivism was low, it was not non-existent, and Swan admitted to having fantasies involving A.L.H. Accordingly, the circuit court noted that there was a "legitimate risk" to Swan's family and other young children. The circuit court also observed that despite Swan's experiences with the lifelong effects of sexual abuse, he perpetrated it anyway. Consequently, and in light of the grave, serious nature of Swan's offenses, the circuit court determined it should protect the community and ensure Swan could not commit another assault. It therefore imposed a total of twenty years' initial confinement and thirty years' extended supervision, explaining that Swan would be sixty-six years old upon his release and supervision would continue for, effectively, the rest of Swan's life.

The maximum possible sentence Swan could have received was eighty years' imprisonment. The sentence totaling fifty years' imprisonment is well within the range

authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Martha K. Askins is relieved of further representation of Swan in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals